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September 13, 2019

VIA NYSCEF
The Honorable Jerry Garguilo
Supreme Court of the State of New York
Suffolk County
John P. Cohalan, Jr. Courthouse
400 Carleton Avenue
Central Islip, New York 11722

Re: *State of New York v. Purdue Pharma L.P.*, Index No. 4000016/2018;
In Re Opioid Litigation, Index No. 4000000/2017 (coordinated).

Dear Justice Garguilo:

We write on behalf of Plaintiff The People of State of New York (the "State") to oppose the motions to limit discovery filed by the Sackler Defendants (NYSCEF 1488), Purdue Defendants (NYSCEF 1555), and the shell companies that may have been parties to the Sacklers' fraudulent scheme (NYSCEF 1536). This letter is also submitted in support of the Cross-Motion of the State, filed contemporaneously herewith, seeking to compel production from the subpoenaed parties as well as the issuance by this Court of letters rogatory directed to foreign residents controlled by the Sacklers.

Movants claim ignorance of the evidentiary connection between the State's fraud claims and the financial records that will detail their long history of shifting money through a multitude of opaque entities. It is elementary, however, that *how* the Sacklers moved and tried to hide their money will be key evidence of the liability of all of the participants, including participants who have not yet specifically been named because additional evidence is needed. On the central point raised by these motions, the propriety and importance of timely securing the relevant, acquirable, and highly probative evidence at issue here is apparent.

Movants' chief objections to the subpoenas are easily dismissed. First, the State's requests for the movants' financial and corporate-control records are unrelated (at this stage) to the assessment of money damages or the enforcement of judgments and are not premature. They are directly related to the core issues of liability presented by this litigation. And, indeed, if there

is potential prejudice in the timing, it is to the State and the other plaintiffs in this and related nationwide actions, given the inherent risk of such records being lost or purged. Second, this Court has repeatedly emphasized that discovery in this case will be liberal.[1] In keeping with that spirit, the State respectfully submits that, to the extent movants raise any legitimate technical objections to the subpoenas, which the State denies, the Court can and should correct any such harmless error *nunc pro tunc.*

And alongside its relevance in establishing the Sacklers' fraud, this evidence of transactional patterns and entity ownership is almost certain to affect any fact-finding the Court might deem necessary to resolve the movants' jurisdictional objections.

For these reasons, the Court should deny the movants' applications, and grant the State's cross-motions for an order: (i) compelling the movants' compliance with the Attorney General's subpoenas; and (ii) for the issuance of letters rogatory for discovery from the gatekeepers of the Sacklers' offshore shell companies in the British Virgin Islands and the Bailiwick of Jersey.

The Information Subpoenaed Is Directly Relevant To The Liability Of The Sacklers And The Other Participants In Their Fraud Scheme

In opposing a motion to quash, "[t]he party issuing the subpoena need only establish that the material sought bears a reasonable relation to the issues at hand, and the subpoena will be upheld unless the information sought is utterly irrelevant to any proper inquiry." *Hyatt v. Franchise Tax Bd.,* 105 A.D.3d 186, 201-02 (2d Dep't 2013); *N. v. Novello,* 13 A.D.3d 631, 632 (2d Dep't 2004); *Kapon v. Koch*, 23 N.Y.3d 32, 34 (2014). Here, the material sought by the State bears a reasonable relation to a central issue at hand: the liability of the Sacklers and the other participants in their fraudulent scheme.

The movants contend that evidence of how the Sacklers moved their tainted Purdue distributions – when, through what entities, and where and how ownership of those proceeds may have been deliberately obscured along the way, as the subpoenas at issue seek to piece together – could *only* be relevant to the measurement of damages or the enforcement of an eventual judgment. The cases they cite to support that argument do not support their position. *See, e.g.*, *Ateni Mar. Corp. v. Great Marine Ltd.*, 225 A.D.2d 573 (2d Dep't 1996) (holding only that discovery of financial records was appropriate in judgment-enforcement proceeding pursuant to CPLR § 5223, without discussing potential relevance to liability); *Gorea v. Pinsky*, 80 Misc. 2d 139 (Sup. Ct. Oneida Cnty. 1974) (same); *Foremost Ins. Co. Grand Rapids v. Facultative Group, Inc.*, 80 A.D.2d 598 (2d Dep't 1981) (same).[2]

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[1] *E.g.*, NYSCEF 1559, Sept, 9, 2019 Order ("Here it has been made known to all parties on several occasions that discovery must be 'liberal, liberal, liberal'".)

[2] To the extent Defendants and the non-party movants also rely on *Exceptional Optics, Inc. v. Optimus, Inc.*, for its statement that when it comes to "what happened to the assets," the "proper place for such discovery should be in enforcement proceedings," that statement was *dicta* in a summary-judgment opinion that conceded the possibility that the disposition of proceeds from a fraudulent conveyance could be relevant to liability. 84 A.D.2d at 516 (1st Dep't 1981).

However, there are cases on point that squarely stand for the proposition that the details of how of transactions that effectuate fraudulent conveyances are structured, and who participates in those transactions and how, are directly relevant to the liability of those participants. Indeed, courts considering fraudulent transfer claims recognize that "direct evidence of fraudulent intent is elusive," and routinely look to circumstantial evidence for so-called "badges of fraud," or those "circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent." *Pen Pak Corp. v. LaSalle Nat'l Bank of Chicago*, 240 A.D.2d 384 (2d Dep't 1997) ("badges of fraud" included "the close relationship among the parties to the transaction" and "the retention of control of property by the transferor after the conveyance").

For example, in *Wimbeldon Fin. Master Fund v. Wimbeldon Fund, PC*, 2016 Misc. LEXIS 4805 (Sup. Ct. N.Y. Cty 2016)*, aff'd* 162 A.D.3d 433 (1st Dep't 2018), the court awarded plaintiff summary judgment on both its actual and constructive fraudulent conveyance claims, based on a recitation of the details of the pattern of transactions subsequent to the relevant conveyances, the web of entity ownership, and the undisclosed financial agreements between entities and individuals. Those details were collectively held to have established, beyond dispute, both the defendants' fraudulent intent and the lack of adequate consideration for their transfers.

Similarly, in *New York City Energy Efficiency Corp. v. Suria*, 2019 N.Y. Misc. LEXIS 1251, *11 (Sup. Ct. N.Y. Cty. March 15, 2019), the court held that "the structure of [a] refinancing" and the particular details of the financial relationships between the involved entities, showed that the defendants' transactions were "deliberately designed to create obstacles" for the defendants' creditors, and thus constituted "badges of fraud" sufficient to meet the plaintiff's pleading burden. Of course, if such structuring is relevant to pleading liability, then it is relevant to proving that liability at trial.[3]

Suria also stands for another point of substantial importance here given the State's explicit inclusion of Doe Defendants as parties in its most recent pleading, to temporarily stand in for the "unknown trusts, partnerships, companies, and/or other legal entities, which are ultimately owned and/or controlled by, and the identities of which are particularly within the knowledge of, one or more of" the Sacklers. As the *Suria* court observed in that case, where certain defendants argued that their particular place in the web of transactions rendered them immune from liability under the DCL, "[l]iability is imposed on parties who participate in the fraudulent transfer of a debtor's property and are transferees of the assets and beneficiaries of the conveyance." *Id*. at *13 (citing *Constitution Realty, LLC v. Oltarsh*, 309 A.D.2d 714, 716 (1st Dep't 2003)).

Likewise, while movants cite *Matter of Uni-Rty Corp. v. Guangdong Fin. Inc.,* 117 A.D.3d 427, 429 (1st Dep't 2014), they do so only for the proposition that DCL claims are

[3] *See also Chaudhry v. Abadir*, 261 A.D.2d 497 (2d Dep't 1999) (upholding order to produce documents regarding corporation's financial condition, including financial statements, records of bank accounts, stock brokerage accounts and income tax records in action to establish shareholder rights, even before rights had been established); *Gitlin v. Chirinkin*, 71 A.D.3d 728 (2d Dep't 2010) (finding bank records requested were material and necessary to the plaintiff's claims of fraud); *Ziolkowski v. Han-Tek, Inc.*, 126 A.D.3d 1431, 1432 (4th Dep't 2015).

subject to the fraud pleading standards, while ignoring the court's ruling in that case that sustained the addition of certain banks as defendants facing liability judgments due to their "direct reci[ept] of alleged constructively fraudulent conveyances as shareholders of the judgment debtor."

What these authorities all establish is a uniform understanding that when a plaintiff alleges actual or constructively fraudulent conveyances of large amounts of money by sophisticated parties, the plaintiff will routinely need to rely on evidence of how defendants structured and timed the movement of money, and of which entities and individuals participated in those movements and how they did so, in order to identify all the necessary defendants and prove its case against them. Here, as explained in the accompanying affirmation, the State selected subpoena recipients likely to have such information based on a good-faith review and analysis of available records, which is all that can be required at this stage of the proceeding. (*See* Simcovitch Aff. ¶¶ 4; 11.)

At the very least, the Court can safely conclude that the evidence requested here is relevant to the action, and that the "futility of the process to uncover anything legitimate" is not "inevitable or obvious'" in this case. *Kapon v. Koch*, 23 N.Y.3d 32, 34 (2014) (internal citations omitted). As such, the Court need not look further for sound legal bases to support the application of its "liberal, liberal, liberal" standards of discovery to the State's requests here.

The Limited Evidence Already Disclosed In Response To The Subpoenas Proves The Point

The State does not bear the burden of demonstrating that its requests are not the "fishing expedition" complained of by the movants here. Indeed, the Second Department has specifically held that a party need not make any additional showing of good cause to obtain disclosure of financial documents that are material and necessary to prosecution of the action. *See One Beacon Ins. Group, LLC v. Midland Medical Care, P.C.*, 54 A.D.3d 738, 740 (2d Dep't 2008) (granting discovery of financial documents in action for common-law fraud and unjust enrichment).[4]

The State *can*, however, demonstrate such good cause by relying on the limited documents that have already been produced. One of the financial institutions that the State subpoenaed was able to provide a partial document production to the State prior to the movants' objection, a production that is being supplied to movants concurrently with this submission.

This already-received document production includes records of wire transfers from and to several of the persons and entities identified by the State in its subpoenas. As detailed in the accompanying affirmation, the State's preliminary analysis of these records reveals approximately $1 billion in transfers between and among the Defendants and their shell companies during the same timeframe that they were draining Purdue of its opioids proceeds. (Simcovitch Aff. ¶ 15.) Already, these records have allowed the State to identify previously-unknown shell companies that one of the Sackler Defendants used to shift Purdue money through

[4] *See also Josephson v. Empire Millwork Corp.*, 283 A.D. 1093, 1093 (2d Dep't 1954); *I.B. Kleinert Rubber Co. v. Arcola Fabrics Corp.*, 20 A.D.2d 630 (1st Dep't 1964).

accounts around the world and then conceal it in at least two separate multimillion-dollar real estate investments back here in New York, sanitized (until now) of any readily-detectable connections to the Sackler family. (*See* Simcovitch Aff. ¶¶ 16-18.) Based on this evidence alone, the State anticipates the addition of one or more of these previously-unknown shell entities as defendants directly liable under the State's DCL claims.

There Is No Undue Burden or Overbreadth Issue

Contrary to the movants' complaints that the discovery sought is burdensome and overbroad, on behalf of the subpoenaed banks and the management employees and offshore attorneys who run their own shell companies, the State's requests are typical and appropriate. Indeed, the State did not devise them itself, but rather, adopted them from the template provided by the National White Collar Crime Center, a federal agency, as a best-practices model for cases where patterns of transactions and ownership are used to establish liability under civil or criminal law.[5] Indeed, the subpoenas do not impose any undue burden on any of the institutions asked to provide evidence. To the contrary, many of the subpoenas seek standard records from sophisticated banks that are accustomed to producing such materials efficiently in response to government investigations. Indeed, one of the recipients has already begun producing materials, promptly and efficiently, until the movants filed their papers to shut the production down. *Alfred E. Mann Living Tr. v. ETIRC Aviation S.a.r.L*, Misc. 3d 1211(A), 2010 N.Y. Slip Op. 52476(U), at *5 (Sup. Ct. N.Y. Cnty. June 24, 2010) (motion to quash denied where petitioner's "vague and conclusory assertions that the Subpoena is vastly overbroad and burdensome is not persuasive"); *Siskin v. 221 Sullivan St. Realty Corp*., 162 A.D.2d 356 (1st Dep't 1990) (finding that the subpoenas served on the non-party bank for the defendant's financial records not overly broad).

To the extent that the movants contend that the State should wait to see whether Purdue or the Sacklers voluntarily produce complete and accurate records of their financial transactions and ownership or management of the shell companies, the State respectfully submits that neither it nor any of the other plaintiffs seeking justice for the opioids epidemic can be asked to take that position. Moreover, the movants' suggestion that parties seeking discovery from non-parties must somehow exhaust other options is wrong on the law. *See Kapon*, 23 N.Y.3d at 38 ("so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the non-party"). The Court can and should reject this argument.

Any Cognizable Privacy Interests Are Easily Protectable

New York courts have long held that individuals have no proprietary or privacy interests in their banking records. *See People v. Doe*, 96 A.D.2d 1018, 1019 (1st Dep't 1983) (acknowledging that a bank customer "has no proprietary or possessory interests" in bank records); *Shapiro v. Chase Manhattan Bank*, 53 A.D.2d 542, 543 (1st Dep't 1976) (noting that bank records are the "business records of the banks" and that customers can "assert neither ownership nor possession); *Dem. Cnty. Comm. of Bronx County v, Nadjari*, 52 A.D.2d 70, 72 (1st Dep't 1976) (acknowledging the "lack of any legitimate expectation of privacy" concerning information voluntarily conveyed to banks). Given that these previously-rejected bases for

[5] National White Collar Crime Center, https://www.nw3c.org/investigative-resources.

maintaining the confidentiality of such records are all the movants rely on here, their motion for a protective order should be rejected.

To the extent the Court entertains any doubt on the subject, the State would have no objection to the imposition of a confidentiality order based on legally-cognizable interests, such as privilege, if those interests are properly asserted.

Any Procedural Defects In The Subpoenas Can And Should Be Cured *Nunc Pro Tunc*

Movants argue that purported defects in the subpoenas in relation to the contours of the Court's prior discovery orders and the notice language of CPLR 3101(a)(4) with respect to non-party subpoenas should result in their non-enforcement. However, neither of these concerns provide a basis to preclude the State from proceeding with this discovery, as the purported flaws are insubstantial and curable. If the State's requests are outside the bounds of the Court's prior discovery order, then the Court can and should amend that order to allow this key evidence to be secured and integrated into the State's case before it is lost to time or spoliation. If the State's subpoenas should contain some more specific language disclosing the basis for its requests to the banks (none of whom have actually asked for an explanation, and most of whom were informed of that purpose in discussions with the State's counsel), or the Sacklers' own shell companies and employees (who obviously already know why the State is asking for the information), then the Court can simply allow the State to reissue the subpoenas with that language included. Indeed, in the very case the movants cite as supposedly establishing the absence of such language as a fatal defect in the course of quashing a subpoena, the court directed that exact cure, and then allowed the challenged discovery to proceed. *See Jamaica Wellness Med., P.C. v. USAA Cas. Ins. Co.*, 49 Misc. 3d 926, 933 (Civ. Ct. Kings Cty. 2015).

More importantly, however, is that not one single non-party has insufficient notice of the basis of the subpoenas. Not one financial institution has complained that they lacked sufficient notice of what is sought and why (Simcovitch Aff. ¶ 6); and no Sackler-related shell company or servant can plausibly make that claim either. (Simcovitch Aff. ¶¶ 11-14); *see also* Aug. 12, 2019 Court Conf. Tr. 48-:22-49:7, 52:8-12 (notifying Court and parties of forthcoming subpoenas[6]). The Sackler Defendants have commenced document productions in this litigation pursuant to Document Requests and Interrogatories served by County Plaintiffs on July 10, 2019 (*see, e.g.*, Aug., 12, 2019 Richard Sackler production letter), attorneys for the individual Sackler Defendants have participated in meet-and-confers with the County Plaintiffs on the scope of those document productions, and two Sackler family members have since been noticed for depositions. Additionally, the Court's February 20, 2019 Order is silent on non-party discovery, and non-party discovery has in fact commenced in this litigation. *See, e.g.,* NYSCEF 1297, July

[6] "We've sued the Sacklers quite aggressively. We believe that they have hidden and made away with the companies that they founded and misrun, and led into the horrible situation that we're in. We think that these people, knowing that doom was approaching, have secreted and transferred billions of dollars. We are today, tomorrow, the next day, issuing subpoenas everywhere. We will come to Your Honor this week for commissions, for letters rogatory, we are chasing those people down. And that is new discovery, and that has not been produced in the M.D.L., they resisted every turn. … I just wanted to clarify the discovery that I was referring to actually isn't directly yet of their clients, it's of their non-defendant shells, investment advisors, banks; it's to get the real records."

19, 2019 Third-Party Document And Deposition Subpoenas. Among other things, the specific document subpoena to that third-party specifically requests "all documents and communications between you and Purdue, or any of the associated companies." The Defendants have not raised any objections to this non-party discovery, and a deposition has been set for September 23, 2019.

For the reasons above and because the Court has repeatedly stressed the need for expeditious discovery in order to get to the earliest possible trial that the residents of this State deserve, any timing defect is immaterial and if necessary, should be corrected *nunc pro tunc*.

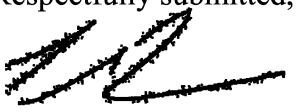
Letters Rogatory Are Necessary To Obtain Properly Sought Discovery

Letters Rogatory are necessary to obtain disclosure from the foreign entities and individuals. CPLR 3108 provides that "[a] commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state." *See also Wiseman v. American Motors Sales Corp*., 103 A.D.2d 230, 234-35 (2d Dep't 1984) (because subpoena service on a witness outside of the State is ineffective, parties may apply to the court to use a commission or letter rogatory to compel disclosure). Through the letters rogatory process, a New York court may request that authorities in a foreign jurisdiction assist the court with obtaining discovery under the laws of that jurisdiction. *Laino v. Cuprum S.A. de C.V*., 235 A.D.2d 25 (2d Dep't 1997); *Boatswain v. Boatswain*, 3 Misc. 3d 803 (Sup. Ct. Kings Cnty. 2004) (finding information sought from a nonparty witness to be material and necessary and ordering a deposition in Canada).

Conclusion

The movants' objections to the discovery of their financial transactions and shell-company ownership and management are simply an attempt to limit the range of evidence that will ultimately be available to the State and other plaintiffs to demonstrate the Sacklers' liability for the fraudulent marketing and money-concealment scheme they orchestrated. For the reasons stated above, the Court should deny the movants' joint applications, and grant the State's cross-motions to compel compliance with the issued subpoenas and for the issuance of letters rogatory.

Respectfully submitted,



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